COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000168

PURDUE PHARMA L.P.,
PURDUE PHARMA INC.,
THE PURDUE FREDERICK COMPANY, INC. d/b/a
THE PURDUE FREDERICK COMPANY
PURDUE PHARMACEUTICALS, L.P., and
THE P.F. LABORATORIES, INC. — APPELLANTS

v.

On Appeal from Court of Appeals,
Case No. 2013-CA-001941-OA

HON. STEVEN D. COMBS
Pike Circuit Court, Division II — APPELLEE

COMMONWEALTH OF KENTUCKY, *ex rel.*
JACK CONWAY, ATTORNEY GENERAL — APPELLEE/REAL PARTY ININTEREST
Plaintiff in Civil Action No. 07-CI-01303

BRIEF OF APPELLEE/REAL PARTY IN INTEREST

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I hereby certify that a true and correct copy of the foregoing was served by U.S. Mail, first class, postage prepaid, on this the 24th day of June, 2014, upon the following: John M. Famularo and Daniel E. Danforth, Stites & Harbison, PLLC, 250 West Main Street, Suite 2300,Lexington, KY 40507-1758; Trevor W. Wells, Miller Wells PLLC, 300 East Main Street, Suite 360, Lexington, KY 40507; Pamela T. May, Pam May Law Firm, P.S.C., P.O. Box 1439, Pikeville, KY 41502; Hon. Steven D. Combs, Pike Circuit Court, 175 Main Street, Pikeville, KY 41501; and Samuel P. Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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INTRODUCTION

Appellants, Purdue L.P., Purdue Pharma Inc., The Purdue Frederick Company, Inc. d/b/a The Purdue Frederick Company, Purdue Pharmaceuticals, L.P. and The P.F. Laboratories, Inc. (hereinafter collectively referred to as "Purdue"), appeal from the Opinion and Order of the Court of Appeals denying Purdue's petition for a writ challenging: (1) the Pike Circuit Court's Order deeming admitted under Kentucky Rule of Civil Procedure 36.01(2) matters within requests for admissions propounded upon Purdue by the Commonwealth of Kentucky, Appellee/Real Party in Interest, (hereafter "Commonwealth"); and (2) the Pike Circuit Court's Order denying Purdue's motion to withdraw or amend the deemed admissions.

The Court of Appeals denied Purdue's petition and held the following based on the firmly-entrenched law of writs in Kentucky:

> ... Purdue is in the same position as every other litigant who faces an adverse decision by the trial court: Settle the litigation or go to trial and, if a judgment is entered against it, appeal. Its concerns regarding the expense of litigation cannot justify this Court's intervention in the trial court process. Purdue's concerns regarding prospective jury bias if the case is remanded by an appellate court is likewise faced by any litigant in a high-profile case and one curable by proper voir dire or change of venue.... [W]e can find no precedent in this Commonwealth for granting the relief requested.

Purdue Pharma L.P. v. Combs, Op. and Order at 13 (Feb. 28, 2014)(R. at 1132).

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes the issues on appeal are sufficiently addressed by its brief and oral argument is not necessary. The Commonwealth believes, as the Court of Appeals panel unanimously held, that the unanimous decision of this Court in *Independent Order of Foresters v. Chauvin,* 175 S.W.3d 610 (Ky. 2005) is controlling

and requires a finding that Purdue has an adequate remedy on appeal. Further, the Commonwealth believes the thorough briefing, supplemental memoranda on the issue of adequacy of remedy on appeal, and oral argument at the Court of Appeals, as well as the lengthy briefs in this appeal, render oral argument unnecessary. Even after being provided with additional briefing opportunity, Purdue still was unable to convince the Court of Appeals that it should disregard the large body of precedent requiring a showing of an inadequate remedy on appeal. Therefore, the Commonwealth believes that oral arguments on this appeal are not necessary and will not assist the Court in its decision.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The facts, which the Court of Appeals determined under well-established Kentucky law did not justify the issuance of an extraordinary writ because Purdue stands as every other litigant with an adequate remedy by appeal, are set forth below.

A. The Commonwealth Commenced Its Action

Purdue pleaded guilty to a felony count of misbranding its drug OxyContin, with the intent to defraud or mislead, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2), on May 10, 2007, in the United States District Court for the Western District of Virginia.[1] *See* Purdue Plea Agreement, at 1 (R. at 863). Purdue's President and Chief Executive Officer, Michael Friedman, its General Counsel, Howard Udell, and its former Executive Vice President of Worldwide Research & Development and Chief Scientific Officer, Paul Goldenheim, pleaded guilty to the strict liability misdemeanor offense of misbranding a drug in violation of 21 U.S.C. §§ 331(a) and 331(a)(1). *See, e.g.,* Howard Udell Plea Agreement, at 1 (May 10, 2007)(R. at 878).

Purdue admitted in an Agreed Statement of Facts, as part of its plea agreement, to having engaged in certain illegal conduct. *See* Agreed Statement of Facts, pp. 5-14 (May 10, 2007)(R. at 892-901). For example, Purdue admitted that beginning around December 12, 1995 and continuing until around June 30, 2001, certain Purdue supervisors and employees, "with the intent to defraud or mislead, marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications," and provided a list of ways in which the intentional fraudulent and misleading marketing and promotion

[1] A list of the devastating effects of OxyContin on the Commonwealth is found in the Commonwealth's Response to Purdue's Writ Petition (R. at 819, fn. 2).

occurred. *Id.*, pp. 5-6 (R. at 892-93). Purdue also admitted that from March 2000 through June 30, 2001, "certain Purdue sales representatives, while promoting and marketing OxyContin, falsely told some health care providers that OxyContin did not cause a 'buzz' or euphoria, caused less euphoria, had less addiction potential, had less abuse potential, was less likely to be diverted than immediate-release opioids, and could be used to 'weed out' addicts and drug seekers." *Id.*, at p. 14 (R. at 901).

Pursuant to the Judgment, Purdue agreed to pay monetary sanctions totaling $600 million to the federal government and to various state Medicaid programs. *United States v. Purdue Frederick Co., Inc.*, 495 F.Supp.2d 569, 572-73, 577, n. 3 (W.D. Va. 2007). Purdue paid Virginia nearly $60 million, but offered the Commonwealth only $551,561.64. The Commonwealth rejected this offer as completely inadequate.

Instead, the Commonwealth opted out of the global Medicaid settlement, and filed its own action in Pike Circuit Court on October 4, 2007 against Purdue and Abbott Laboratories.[2] The Commonwealth alleges various causes of action surrounding the manufacturing, marketing, sales practices, and promotion of Purdue's drug, OxyContin. Simultaneous to filing the Complaint, the Commonwealth served Purdue and Abbott with discovery pursuant to the Kentucky Civil Rules, including Requests for Admissions pursuant to CR 36.01. *See* Requests for Admissions to Purdue (Oct. 4, 2007)(R. at 925-954) (collectively). On October 10, 2007, the Commonwealth filed its First Amended Complaint. First Am. Compl. (Oct. 10, 2007)(R. at 243-301).

[2] Purdue and Abbott entered into Co-Promotion Agreement under the terms of which Abbott co-marketed OxyContin to selected healthcare providers, mostly hospital-based healthcare providers, including anesthesiologists, surgeons, and emergency medicine practitioners. For purposes of this brief, the co-defendants below, Abbott Laboratories, Inc. and Abbott Laboratories, will be collectively referred to as "Abbott."

B. Purdue's Attempts to Avoid the Jurisdiction of Pike Circuit Court

Purdue removed the Pike Circuit Court action to the Eastern District of Kentucky and transferred it to the Southern District of New York ("SDNY") into an unrelated Multi-District Litigation, where it was stayed. Finally, on September 26, 2011, the SDNY ordered the case remanded to Pike Circuit Court. *In re Oxycontin Antitrust Litig.*, 821 F.Supp.2d 591 (S.D.N.Y. 2011)(R. at 968-978). Purdue sought leave to appeal the remand, which the Second Circuit Court of Appeals denied on January 9, 2013. *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2nd Cir. 2013)(R. at 980-990).

On February 8, 2013, more than five (5) years after removal, the SDNY returned the case to Pike Circuit Court. Instead of focusing its efforts on defending the Pike Circuit Court action, on that same day, Purdue sought to invoke the jurisdiction of two other courts to continue its litigation strategy to avoid litigating the case in Pike County at all costs. Purdue filed a Motion to Enforce an unrelated Consumer Protection Consent Judgment in the Franklin Circuit Court. Purdue also sought to reopen the closed criminal case in the Western District of Virginia, filing a motion to enjoin certain claims in the Pike County Action under the Federal All Writs Act based on the federal settlement that Kentucky did not join. Purdue's motion there also attempted to limit the Pike Circuit Court in deciding discovery, evidentiary, and damages issues. The motions forced the Commonwealth to spend scarce litigation resources to oppose motions in these ancillary forums.

On August 5, 2013, the Western District of Virginia denied the motion before it and Purdue did not appeal that decision. *United States v. Purdue Frederick Co., Inc.*, 963 F.Supp.2d 561 (W.D. Va. 2013)(R. at 99-1006). In his opinion, Judge James Jones stated:

> Given the equities and according proper respect to the principles of comity and federalism that are part of the foundation of our judicial system, the entry of any injunction – even one narrowly-tailored to cover only discovery and evidence in the State Court Action – would be inappropriate.

Id., at 579 (R. at 1005). On August 23, 2013, the Franklin Circuit Court denied Purdue's motion to enforce the Consumer Protection Consent Judgment holding that the Pike Circuit Court claims were unrelated and stating: "After dragging the Commonwealth for five years through the federal court system and back, Purdue cannot now, for the first time, seek equitable relief to bar the Commonwealth from asserting its claims …." *Commonwealth of Kentucky v. Purdue Pharma LP, et al.*, Franklin Circuit Court, Civil Action No. 07-CI-00740, Order (Aug. 28, 2013)(R. at 1008-1015).

Despite having the litigation resources and strategic wherewithal to simultaneously file substantive motions in two ancillary jurisdictions on the same day Pike Circuit Court regained the case file, Purdue failed to timely answer the outstanding request for admissions in the Pike County Action. As a result, the requests were deemed to have been admitted by operation of law pursuant to CR 36.01(2). On March 29, 2013, the Commonwealth moved the Pike Circuit Court for an order memorializing the admissions for the record. The Court granted the motion and entered its Order deeming the requests admitted on April 1, 2013. (R. at 138-140.)

Subsequently, the parties briefed Purdue's and Abbott's motions to rescind, and extensively briefed Purdue's and Abbott's alternative motions to withdraw or amend their admissions.[3] On September 25, 2013, the Pike Circuit Court heard lengthy oral argument

[3] On June 10, 2013, Purdue made its first, and to date only, substantive motion in Pike Circuit Court when it asked for a change of venue to either Fayette County or Franklin County. During the hearing on its motion, Purdue called an expert it paid at least $70,000 to testify about a study it commissioned and a survey it conducted beginning on January 22, 2013 – prior to the case being returned to Pike Circuit. Not

on the motions, during which the Commonwealth reiterated its contentions that: CR 36.01(2) deemed the matters in the requests admitted; deemed admissions could relate to dispositive issues in a case; Purdue failed to meet the requirements for withdrawal or amendment of admissions under CR 36.02; the Commonwealth would be prejudiced if the Court withdrawal or amendment of the admissions; and the Court had discretion to deny the motions even if the CR 36.02 requirements had been met. After hearing argument, the Court exercised its discretion and denied Purdue's motions and granted Abbott's motions, which made substantively different arguments. (R. at 142.)

After that ruling, in yet another attempt to evade the jurisdiction of Pike Circuit Court, Purdue sought the extraordinary writ from the Court of Appeals. The Court of Appeals denied the writ and this appeal followed. This petition is a thinly-veiled and impermissible interlocutory appeal of a discovery ruling by the Circuit Court in violation of KRS 22A.020 and CR 54.01. The Court of Appeals held that Purdue failed to meet the requirements for the issuance of a writ because it has an adequate remedy by appeal and could not show irreparable injury. This is now the seventh Court Purdue has used to avoid the jurisdiction and rulings of Pike Circuit Court. This Court should deny Purdue's petition to change decades of precedent and uphold the decision by the Court of Appeals.

ARGUMENT

I. SUMMARY OF ARGUMENTS

The Court of Appeals held, based on decades of precedent, that Purdue did not meet the strict requirements for the issuance of an extraordinary writ. On appeal, Purdue, in essence, asks this Court to change the law of writs in Kentucky for it, a multi-billion-

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only was Purdue actively litigating in other jurisdictions to avoid or limit Pike Circuits jurisdiction, it was actively, and aggressively, setting the table for its attempt to move the case out of Eastern Kentucky. Judge Combs overruled the motion on September 25, 2013.

dollar pharmaceutical company, because it cannot meet the firmly-entrenched requirements for that extraordinary remedy. This Court should reject Purdue's arguments, uphold Kentucky's law on writs, and affirm the Court of Appeals.

First, as a threshold matter, Purdue has an adequate remedy on appeal. If Purdue receives an adverse judgment, it can appeal the decision under the normal appellate procedure in CR 73. Purdue's speculative arguments that it will incur litigation costs and be subject to a large judgment were categorically rejected in *Independent Order of Foresters v. Chauvin,* 175 S.W.3d 610 (Ky. 2005) and do not render an appeal inadequate. Furthermore, Purdue continues to litigate the effects of the admissions in Pike Circuit Court. Purdue has engaged in a litigation strategy that has delayed this case for over six (6) years and now it complains that it will have to incur litigation costs. As other courts have recognized, any equitable consideration in this case should fall in favor of the Commonwealth.

Second, Purdue concedes it cannot meet the requirement of irreparable harm, so it attempts to broaden a very limited exception to the irreparable harm requirement and argues this case is a "certain special case" in need of this Court's review. The argument is meritless and the theory is contrary to the primary rationale for limiting writs – to maintain orderly judicial administration. It will instead open the floodgates to litigants who have lost a discretionary ruling in Circuit Court to utilize the extraordinary relief of a writ in the absence of a right to an interlocutory appeal. To sidestep this inevitable effect, Purdue asks this Court to carve out a special rule for multi-million dollar corporations that caused great harm. Either rule would fundamentally alter the authority of Circuit Court Judges to oversee discovery effectively and efficiently.

Third, the Circuit Court committed no error in either its April 1, 2013 order that merely memorialized what had already occurred – that the request for admissions were deemed admitted by operation of CR 36.01(2) – or its order of September 25, 2013 denying Purdue's motion to withdraw those admissions. The record contains ample evidence to support the orders. Purdue argues that this Court must step in because the Circuit Court erred by not following this Court's precedent, then it argues that this Court must step in because there is no precedent. However, Purdue fails to recognize in these contrary positions that there is ample authority to support the Circuit Court's orders.

Furthermore, the issuance of a writ will harm the Commonwealth because, due to Purdue's delays, the memories of many witnesses will have faded, while other witnesses, including former Purdue General Counsel Howard Udell, are dead. Udell, one of the primary architects of Purdue's illegal activities, pleaded guilty along with the company and two other Purdue executives, and personally visited Kentucky prior to his guilty plea to try to hoodwink Kentucky officials into not taking action against Purdue.

II. STANDARD OF APPELLATE REVIEW FOR DENIAL OF A WRIT

Issuance of a writ is typically reviewed for an abuse of discretion. *Southern Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 926 (Ky. 2013). However, if presented, the Court reviews a question of law *de novo*. *Id.* This Court is not bound by the Court of Appeals' analysis and may affirm on any grounds the record supports. *Id.* The Court of Appeals determined Purdue had an adequate remedy by appeal or otherwise and ***did not*** reach the merits of Purdue's claim, nor did it make a determination of whether or not this case fell into the "certain special cases" exception to the irreparable harm requirement.[4]

[4] The Court of Appeals, in dicta, discussed Purdue's argument, but it clearly stated "[W]e refrain from commenting on the merits of Purdue's claims...." *Purdue Pharma L.P. v. Combs*, Op. and Order at 10

III. A WRIT IS ONLY AVAILABLE IN RARE CIRCUMSTANCES

The issuance of a Writ of Prohibition or Mandamus is an extraordinary remedy.[5] *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 12 (Ky. 2007). Courts "have always been cautious and conservative both in entertaining petitions for and in granting such relief." *Id., citing Bender v. Eaton,* 343 S.W.2d 799, 800 (Ky. 1961). Moreover, it has been a longstanding rule that "[e]xtraordinary writs are disfavored ... ." *Id. citing Buckley v. Wilson*, 177 S.W.3d 778, 780 (Ky. 2005). "This careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of our circuit and other courts." *Coleman,* 236 S.W.3d, at 12. Just last year, this Court reaffirmed this cautionary approach to reviewing petitions for Writs by stating:

> In fact, courts are decidedly loath to grant writs as a 'specter of injustice' always hovers over writ proceedings. This specter is ever present because writ cases necessitate an abbreviated record which magnifies the chance of incorrect rulings that would be prematurely and improperly cut off the rights of litigants.

Combs, 413 S.W.3d at 926 (internal quotations omitted). Furthermore, "[i]f the avenue of relief were open to all who considered themselves aggrieved by an interlocutory court order, we would face an impossible burden of nonappellate matters." *Coleman* 236 S.W.3d at 12.

There are two well recognized classes where a writ may be granted. Purdue concedes the Circuit Court is proceeding within its jurisdiction but argues that this case falls under the second category of writs where relief *may* be granted only if:

(Feb. 28, 2014)(R. at 1129).

[5] As it did in its Petition, Purdue again seeks for a Writ of Mandamus or, in the alternative, a Writ of Prohibition. It asks this Court to both prohibit the Circuit Court from enforcing its order deeming the request for admissions admitted and to also mandate the Circuit Court to enter an order permitting Purdue to withdraw its admissions. (Purdue's Br., at 42, filed Apr. 25, 2014.) .

> [T]he lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise ***and*** great injustice ***and*** irreparable injury will result if the petition is not granted.

Id., *citing Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004), *as modified on denial of reh'g*, (Dec. 16, 2004)(emphasis added).

Purdue concedes that it cannot meet the irreparable injury prong, so it argues that this case is a "certain special case" that will allow a writ to be issued. (Purdue Br. at 14.) While this exception exists, it is very limited. *Chauvin*, 175 S.W.3d at 613. In such cases, the irreparable injury requirement is replaced by a requirement for the Petitioner to show that "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Bender,* 343 S.W.2d at 801; *see Jones v. Constanzo*, 393 S.W.3d 1, 4 (Ky. 2012); *Combs,* 413 S.W.3d at 925.

Therefore, to fall under the "certain special cases" exception, the Court *may* issue a writ if Purdue shows (1) the Circuit Court acted erroneously; (2) there is no adequate remedy on appeal; (3) a substantial miscarriage of justice will occur; ***and*** (4) correction of the error is appropriate in the interest of orderly judicial administration. All four requirements must be met. It is still within the discretion of the court to deny issuance of the writ even if the requirements are met. *Edwards v. Hickman,* 237 S.W.3d 183, 189 (Ky. 2007); *Combs,* 413 S.W.3d at 925.

IV. PURDUE HAS AN ADEQUATE REMEDY BY APPEAL

A. Inadequate Remedy by Appeal is an Absolute Prerequisite

Whether there exists an adequate remedy on appeal is a *condition precedent* "for the mere *availability* of a writ as a possible remedy." *Chauvin,* 175 S.W.3d at 615

(emphasis in original). The determination of whether there is an adequate remedy on appeal or otherwise is part of "a practical and convenient formula for determining, *prior to deciding the issue of alleged error*, if petitioner may avail himself of this remedy" *Bender,* 343 S.W.2d at 801(emphasis in original). The requirement of an adequate remedy as a condition precedent to granting this extraordinary relief is a long-standing and well-developed rule. *See Goheen v. Myers,* 18 B.Mon. 423, 426, 57 Ky. 423 (Ky. 1857)(writ not appropriate because an adequate remedy at law existed since an appeal was expressly authorized by the Civil Rules); *White v. Kirby*, 144 S.W. 369 (Ky. 1912) (merits of petition not reached because petitioner's had an adequate remedy on appeal even if an erroneous judgment is rendered); *Reeves v. Bell,* 147 S.W.2d 711 (Ky. 1941) (writ not appropriate because, in addition to there being no irreparable harm, an adequate remedy on appeal exists if ownership of whisky is decided adverse to petitioner's claim). Further, under Kentucky law a writ cannot be used as a substitute for an appeal. *National Gypsum Co. v. Corns,* 736 S.W.2d 325, 326 (Ky. 1987), *citing Merrick v. Smith,* 347 S.W.2d 537 (1961).

Even when petitioners claim, as Purdue does, that their case falls within the "certain special cases" exception to the irreparable injury requirement, the prerequisite determination of an adequate remedy on appeal still must be met. "Our cases involving controversies of the second class … have consistently (apparently without exception) required the petitioner to pass the first test; i.e. he must show he has no adequate remedy by appeal or otherwise." *Bender,* 343 S.W.2d at 801. When a petitioner has an adequate remedy on appeal, "it cannot claim the protection of the 'certain special cases' exception" to the irreparable injury requirement. *Chauvin,* 175 S.W.3d at 617.

In December 2013, this Court reiterated this longstanding rule, stating: "In order for a writ to issue, the lack of an adequate remedy by appeal or otherwise is an ***absolute prerequisite,*** regardless of whether or not the writ is sought by alleging irreparable harm or invoking the "certain special circumstances" exception." *Ridgeway Nursing & Rehab. Facility, LLC v. Lane,* 415 S.W.3d 635, 640 (2013) (emphasis added). The **unanimous** Court added "our case law is clear that the certain-special-cases exception ***only supplants the requirement that a petitioner prove irreparable harm … not the requirement that there be no adequate remedy on appeal*** or otherwise." *Id.*, at 641-2 (emphasis added). Even though Purdue claims that this case falls into the "certain special cases" exception to the irreparable harm requirement, that claim has no bearing on the "absolute prerequisite" determination of whether there is an adequate remedy by appeal.

The Court of Appeals was correct in first determining the question of adequate remedy on appeal before reaching the merits.

B. Litigation Costs, Use of Resources, and Potential for a Large Judgment Are Not Sufficient For Appeal to be an Inadequate Remedy

Purdue argues that it lacks an adequate remedy by appeal because certain special circumstances apply to this case and because of unfair settlement pressure and other prejudice. In its Opinion the Court of Appeals rejected Purdue's arguments and held:

> Under the current law, we must conclude although Purdue faces enormous financial liability, the trial court's ruling may be decisive as to liability, and even incorrect, **Purdue is in the same position as every other litigant who faces an adverse decision by the trial court: Settle the litigation or go to trial and, if a judgment is entered against it, appeal. Its concerns regarding the expense of litigation cannot justify this Court's intervention in the trial court process.** Purdue's concerns regarding prospective jury bias if the case is remanded by an appellate court is likewise faced by any litigant in a high-profile case and one curable by proper voir dire or change of venue. In conclusion, as compelling as Purdue's arguments may be to this Court, we can find no

> precedent in this Commonwealth for granting the relief requested. (R. at 1132.)(emphasis added)

The Court of Appeals was correct in finding that Purdue stands just as any other litigant facing a potential adverse judgment. "No adequate remedy by appeal" means that any injury to a petitioner "could not thereafter be rectified in subsequent proceedings in the case." *Chauvin,* 175 S.W.3d at 615, *citing Bender*, 343 S.W.2d at 802. Discovery orders, including regarding admissions, are left to the sound discretion of the trial court and are interlocutory. *The Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 376 (Ky. 1984); s*ee Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4, 8 (Ky. App. 2006). Appellate courts do not use writs as a "corollary to [its] 'error correction power' to revise or correct the discretion of an inferior court." *Bender*, 343 S.W.3d at 802.

While arguing inadequacy of appeal based on the deemed admissions, Purdue is conversely arguing in front of Pike Circuit Court that the admissions are not dispositive. In response to the pending Commonwealth's Motion for Partial Summary Judgment on Liability Purdue argued several of the admissions do not apply to the Commonwealth, and thus are not relevant, and that the admissions do not satisfy the element of causation.[6] Yet, to this Court, Purdue argues the dispositive and devastating effects. While the Commonwealth believes, as the Court of Appeals stated, the admissions are dispositive, this will be decided by Judge Combs when he rules on the Commonwealth's motion – one of the many other interlocutory rulings he is expected to make.

If Purdue has an adverse finding of liability entered against it, ***if*** the jury

[6] Purdue particularly seeks to have it both ways regarding Admission 19. On this Admission, one of the three that admits causation, Purdue partly bases its $1 billion damages scenario, but hedges on its applicability to the Commonwealth even in its brief (Purdue Br. at 21-23) and they adamantly argue that it does not apply in their Response to the Commonwealth's Motion for Partial Summary Judgment on Liability which is pending below.

recommends a large damages award, ***if*** Pike Circuit Court upholds the damages award and enters a judgment for that amount, Purdue may appeal the judgment and the ruling on the deemed admissions.

1. *Chauvin* and Other Kentucky Precedent Prohibit a Writ

This Court has consistently held that the cost of litigating a case will not satisfy the requirements for an extraordinary writ. In *Chauvin,* the petitioner claimed that an appeal after having to go through a full trial was necessarily inadequate. 175 S.W.3d at 615. Rejecting the contention, the Kentucky Supreme Court stated: "That Foresters faces the costs of litigation absent our ordering the Court of Appeals to grant the writ simply is not enough to show inadequate remedy by appeal." *Id.*

Purdue's cost of litigation argument overlaps the two separately considered prerequisites of showing an inadequate remedy and showing irreparable harm.[7] However, the Court in *Chauvin* left no doubt in rejecting this argument for both prongs. *Id.* at 616. Mere loss of valuable rights or property through an error of the trial court does not constitute great and irreparable injury entitling a petitioner to a writ. *Id.*, *citing Schaetzley v. Wright*, 271 S.W.2d 885, 886-87 (Ky. 1954). "Thus, *the delay incident to litigation and appeal by litigants who may be financially distressed cannot be considered as unjust, does not constitute irreparable injury, and is not a miscarriage of justice."* *Chauvin,* 175 S.W.3d at 616 (emphasis in original), *quoting Ison v. Bradley,* 333 S.W.2d 784, 786 (Ky. 1960).[8]

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[7] In reality, Purdue is using an old and consistently rejected "irreparable harm" argument reformulated as an "inadequate remedy" argument. *See Ison v. Bradley,* 333 S.W.2d 784, 785 (Ky. 1960). While creative, this Court, in *Chauvin,* discussed and rejected this hybrid argument.

[8] In *Ison,* the petitioners claimed they were "under a heavy burden of debt for medical expenses and hospital bills incurred as a result of the wreck and are financially unable to wage an economic battle with two insurance companies." *Id.* 333 S.W.2d, at 785. The *Ison* petitioner's claim of financial hardship is much more compelling than that of Purdue, a highly-profitable pharmaceutical company, yet the former

Likewise, in *Brown v. Knuckles* the petitioners asked the former Court of Appeals to issue a writ to prohibit the Circuit Court from proceeding with a lawsuit. 413 S.W.2d 899 (Ky. 1967). Petitioners argued they would be irreparably injured by having to incur the expense of defending the suit. *Id.,* at 901. The Court discarded this argument, stating: "Petitioners are in no different position from any other defendant who is put to the expense of contesting a claim." *Id.; see also Fayette County Farm Bureau Fed'n v. Martin,* 758 S.W.2d 713, 714 (Ky. App. 1988)("That a party will be exposed to the inconvenience and cost of litigation does not alone justify immediate review of an otherwise nonfinal order."); *Fritsch v. Caudill,* 146 S.W.3d 926, 930 (Ky. 2004)("As to great and irreparable injury, we see none. Inconvenience, expense, annoyance, and other undesirable aspects of litigation may be present, but great and irreparable injury is not.").

As in *Chauvin* and its predecessor cases, Purdue's claims that it will be forced to expend money to litigate this case are insufficient. The orders have not placed Purdue in any position where it must take a route most reasonable parties would avoid. If it is in a position it does not like, it is because it failed to follow the Civil Rules, which clearly set forth the requirement for responding to requests for admissions. Any party that has received a discovery order adverse to its position or interest may spend money in litigation expenses to attempt to correct a perceived error. Thus, Purdue is "in no different position from any other defendant who is put to the expense of contesting a claim" *Brown,* 413 S.W.2d at 901. As such, Purdue's "cost of litigation ... is simply not enough to show inadequate remedy by appeal." *Chauvin,* 175 S.W.3d, at 615.

The Court should likewise reject Purdue's assertion that the Court of Appeals pointed out during oral argument that postponing review of the Pike Circuit Court Orders

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Court of Appeals rejected this argument.

until the end of the case will waste resources "because it is already readily apparent that the Circuit Court committed reversible error." (Purdue Br. at 28.) Every day parties receive adverse interlocutory rulings from Circuit and District Court judges. In nearly every instance, the adverse party feels aggrieved by the order and believes it to be erroneous. To permit these aggrieved parties to challenge interlocutory rulings by way of extraordinary writ flies in the face of the primary reason for the stringent standards for granting a writ. *See Combs,* 413 S.W.3d at 925. For these reasons, the same argument Purdue makes in this case has recently been rejected by this Court. In *Mahoney v. McDonald-Burkman*, this Court held that the threat of litigating a matter twice does not constitute irreparable harm, and warned: "Without the stringent writ standards, the resources of the appellate courts could easily be consumed with piecemeal appellate review of pre-trial matters. The overall effect would be less efficiency and more costly delay in getting cases to trial." 320 S.W.3d 75. 79 (Ky. 2010).

The Court should also reject this argument as disingenuous. Purdue has employed a very active litigation strategy to avoid the jurisdiction of the Circuit Court for the past six and a half (6½) years, in seven (7) different courts. Purdue has spared no expense at avoiding accountability. It is laughable that Purdue now claims it is harmed because a trial will be costly. The alleged financial burden on Purdue to take this case to trial – particularly given the alleged conduct – does not render an appeal inadequate. Purdue has shown it has adequate financial resources to litigate this action extensively.

The longstanding rationale in *Chauvin, Brown, Mahoney, Martin, Fritch,* and *Ison* equally applies to this case and the Court should easily dispose of Purdue's argument.

2. Speculation About Potential Damages Does Not Justify a Writ

As with its cost of litigation arguments, Purdue's speculative large damages argument must fail. Purdue again tries to differentiate this case because of the potentially large amount of money at stake. Simply because this case carries a large amount of potential damages does not entitle Purdue to consideration of a writ when it *has* an adequate remedy on appeal. This Court summarily rejected such an argument in *Chauvin,* stating: "In effect, we are invited to apply a different standard to big cases than we would apply to more modest cases. *The unfairness and unworkability of such a practice is evident and needs no further comment."* 175 S.W.3d at 615 (emphasis in original), *quoting Corns,* 736 S.W.2d at 327. The Court should again reject the argument as unworkable and unfair in this case, especially considering it is based on pure speculation.

In addition, and like the petitioners in *Garrard County Board of Education v. Jackson,* 12 S.W.3d 686, and *Merck & Co., Inc. v. Combs*, 2011 WL 1104133 (Mar. 24, 2011)(unpublished)(R. at 1029-1033)(Ex. A), Purdue presents no specific evidence of a crippling effect of an adverse judgment that may be entered. At the Court of Appeals, Purdue presented an affidavit of its Executive Vice President and Chief Financial Officer offering his opinion on the impact of the company's business operations of a judgment of or exceeding $1 billion, and the adverse effects of appealing a judgment against it. (R. at 1101-06.) After pointing out that Purdue generated approximately $2.2 billion in annual sales revenue in 2012, the affiant based all of his opinions on a hypothetical judgment of $1 billion, including speculation about posting enormous collateral to obtain a supersedeas bond pending appeal and about setting aside at least a several-hundred-million-dollar reserve to prepare for the contingency that it would lose on appeal. *Id.*

Were the Commonwealth permitted to depose or cross examine the affiant, it would easily show that this is mere speculation.

Purdue bases its speculation on statements in the media about a *potential* nine-figure compensatory damages award and balloons the floor of a nine-figure damages award 10 times to speculate about the impact of a judgment of $1 billion or more. This imagined worst case scenario for Purdue is not objective evidence of "unique and extraordinary prejudice" to justify the departure from well-established precedent surrounding writs. It is nothing more than speculation based on more speculation.

Purdue offers no valid explanation as to how its speculation about financial hardship from a possible adverse judgment is not a cost of litigation argument. Purdue paints itself as a small company whose financial stability would be threatened by a potentially large judgment. (Purdue Br., at 19, n. 11.) Media reports indicate it has sold more than $27 billion worth of OxyContin alone since 1996.[9] Purdue generated $2.2 billion in sales revenue in 2012. (R. at 1102.) Further, Purdue paid $600 million as monetary sanctions in its criminal guilty plea and settlement in 2007 and Purdue is still standing as a multi-billion dollar company.

If the Court changes the long-standing law on writs as Purdue requests, nothing would prevent any litigant from running to appellate courts whenever sued, arguing an adverse judgment would bankrupt it. Purdue offers no reason why it deserves special treatment. *See Ison*, 333 S.W.2d at 335. The fact the case carries a large potential damage amount does not entitle Purdue to a writ when it *has* an adequate remedy on appeal. There is no special review for high dollar cases. *Chauvin,* 175 S.W.3d at 615.

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[9] Scott Glover and Lisa Girion, *OxyContin maker closely guards its list of suspect doctors*, L.A. Times, Aug. 11, 2013, http://articles.latimes.com/2013/aug/11/local/la-me-rx-purdue-20130811 (last visited Feb. 4, 2014).

C. *PremierTox 2.0* and *Wright* are Easily Distinguishable

Purdue cites completely inapposite cases to argue that special circumstances exist that render appeal inadequate. Purdue cites *PremierTox 2.0 v. Miniard,* 407 S.W.3d 542, 548 (Ky. 2013) to assert that the "right to appeal does not necessarily indicate an adequate remedy." PremierTox 2.0 sued Kentucky Spirit, a company under contract with the state as a Medicaid managed care organization, claiming Kentucky Spirit owed it $1.9 million for services it provided to Medicaid recipients. The trial court ordered Kentucky Spirit to deposit the full amount allegedly owed into an escrow account. Kentucky Spirit sought, and the Court of Appeals granted, a writ to prohibit this action. Affirming, this Court provided the following facts of the case:

> Obviously, Kentucky Spirit could appeal from the final judgment that will eventually be entered in the Russell Circuit Court in the event that judgment favors PremierTox. However, that option does not necessarily provide an adequate remedy for the injury. If the writ of prohibition is not issued, the circuit court ***will divest Kentucky Spirit of its money*** without a due process adjudication of the validity of PremierTox's claims. The amount of money in dispute is significant. ***The circuit court's order is essentially a pre-judgment attachment*** for which Appellees do not have an adequate remedy on appeal or otherwise.

Id. (emphasis added). Unlike in this matter, that appeal was not an adequate remedy because the trial court's order was "essentially a pre-judgment attachment." *Id.*

Purdue cites *Kentucky Farm Bureau Mut. Ins. Co. v. Wright,* 136 S.W.3d 455, 456 (Ky. 2004), wherein the appellant asked this Court to review the Court of Appeals' denial of its petition for extraordinary relief. The writ sought to vacate a mediation order entered by the Circuit Court requiring written disclosure of the extent of settlement authority prior to mediation and directing mandatory fines, costs, and penalties if the claims were settled following the conclusion of the mediation. *Id.* The Court concluded:

> Under the trial court's order, parties who settled after the conclusion of mediation, despite a belief in their right to do so, ***would be required to face mandatory fines and penalties***, a route most reasonable parties would avoid. We conclude that the post-mediation settlement provision imposing additional costs, fines and penalties exceeds trial court discretion and results in irreparable harm without an adequate remedy by appeal.

Id. (emphasis added).

Similar to *PremierTox 2.0*, *Wright* involved an 'extra' penalty in the form of mandatory fines and penalties against the appellant if it settled after mediation. The facts of *PremiereTox 2.0* and *Wright* are easily distinguishable from this action, as there is no 'extra' penalty in this action, in any form. The Pike Circuit Court did not order Purdue to divest any money as a pre-judgment attachment. Neither did the Pike Circuit Court impose any mandatory fines and penalties against Purdue. Instead, the Pike Circuit Court properly exercised its discretion to rule on a routine pre-trial discovery matter.

D. Various Class Action Lawsuits Purdue Cites are Distinguishable

Furthermore, Purdue misplaces its reliance on *Merck & Co.* and *Jackson*, 12 S.W.3d 686 (2000). Purdue argues these decisions show that this Court has recognized certain special circumstances can exist where other kind of procedural orders can be challenged through mandamus due to the unfair settlement pressure they create. (Purdue Br., at 15.)

In *Merck & Co.*, this Court affirmed the Court of Appeals' denial of a writ of prohibition against further proceedings as a class action in Pike Circuit Court. 2011 WL 1104133. The Court found that *Jackson* was dispositive, holding that a petition for a writ of mandamus is not a proper medium for challenging the trial court's discretion in certifying a class. *Id.* at *2. Merck argued that *Jackson* left the door open for mandamus review in certain cases under the Court's citation of recent federal decisions where courts

granted writs of mandamus and ordered the decertification of class actions in medical products litigations. *Id.*, at *3. The Court decided that although *Jackson* emphasized that a writ of prohibition is usually an inappropriate tool to challenge class certification, "it acknowledged that certain special circumstances can exist where *a class* can be challenged through mandamus." *Id.* (emphasis added).

Further, the Court rejected Merck's arguments, which the record reflected, that the class the Pike Circuit Court certified could include up to 200,000 members with a potential liability in the range of $60 million, which Merck argued would be crippling. *Id.* The Court ruled that Merck presented no specific evidence of how the class action would be crippling to it and the Court did not see how there would not be adequate remedy by appeal. *Id.* The Court also rejected Merck's invitation to expand the circumstances under which mandamus review of class action litigation is permissible. *Id.*, at *4. While Merck identified potential shortcomings in the plaintiffs' case and class certification, including the Pike Circuit Court's failure to make findings required by CR 23.01, the Court found no unique and extraordinary prejudice to depart from *Jackson*, and held Merck's proper remedy was on direct appeal. *Id.*

In *Jackson*, the Court affirmed the denial of a writ of mandamus that the petitioner sought to order the trial court to de-certify a class action. 12 S.W.3d at 690-91. The Court distinguished several decisions in federal class actions, each of which not only involved multi-state litigation over medical products, but presented issues other than erroneous class certification. *Id.* Purdue presents one of those federal decisions, *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995), as persuasive authority for its argument.

In *Rhone-Poulenc Rorer,* a nationwide class action of about 400 plaintiffs had filed some 300 lawsuits – 60 percent in state courts – against drug companies that manufactured blood solids, on behalf of hemophiliacs infected by AIDS as a result of using the defendants' products. 51 F.3d. at 1294, 1296. The defendants had won 12 of 13 trials in various courts, and courts had denied class certification in all other hemophiliac HIV suits. *Id.* at 1296, 1298. In the underlying case, a federal district judge certified one of the 300 cases as a class action with respect to particular issues, rather than as a class action for the adjudication of the entire controversy. *Id.* at 1296-1297. Instead, the judge foresaw a special verdict by a jury bearing on the defendants' liability for negligence under either of the plaintiffs' two theories. *Id.* at 1297. If the special verdict found no negligence, it would presumably end all the cases unless other theories proved viable. *Id.* If it found negligence, individual class members would file individual tort actions in state and federal courts, using it as collateral estoppel on the issue of negligence. *Id.*

The Seventh Circuit began by stating that irreparable injury is not sufficient for mandamus for class certification orders, and the petitioner must also show an abuse of discretion that can fairly be characterized as gross, very clear, or unusually serious. 51 F.3d at 1295. The Court pointed out that only upon the entry of a final judgment determining liability and damages would the case and interim rulings like class certification be appealable. *Id.* However, a final judgment following a special verdict and after a trial on remaining liability issues and damages would have come too late, because of the magnitude of the risk for the defendants by the class action, in contrast to the individual lawsuits. *Id.*

Absent the class certification, the defendants would have faced 300 lawsuits, but

based on the defendants winning 12 of the first 13 trials they were likely to win most of the remaining cases. *Id.* at 1298. If class certification stood, the defendants would have faced thousands of plaintiffs. *Id.* If the class plaintiffs won the class portion of the case establishing liability under either of their negligence theories, the defendants might have faced $25 billion in potential liability, and bankruptcy. *Id.* The Court surmised that without class certification, the defendants may have potential liability up to $125 million. *Id.* The defendants – and industry – would then have been under intense pressure to settle. *Id.* The Court found the district judge's ruling would inflict irreparable harm and that the plan the judge devised for the litigation exceeded the bounds of allowable judicial discretion. *Id.* First, the ruling would have forced the defendants to stake their companies on the outcome of a single jury trial, or to settle by the fear of risk of bankruptcy even if they had no legal liability. *Id.* That single trial would have been in accordance with no actual law of any jurisdiction, with the jury receiving an instruction merging the negligence standards in all states and the District of Columbia. *Id.* at 1300. One jury would have held "the fate of an industry in the palm of its hand." *Id.*

The *Rhone-Poulenc Rorer* Court was concerned with having a jury decide defendants' negligence under a legal standard crafted under the doubtful assumption that the common law on negligence was nationally uniform. *Id.* The Court also found a looming infringement on the Seventh Amendment right to a federal civil jury trial, and held that an extraordinary writ of mandamus was warranted. *Id.* at 1304.

As the facts of *Rhone-Poulenc Rorer* show, and just as this Court found in the class action cases of *Jackson* and *Merck & Co., Inc.*, the federal case is completely inapposite to the instant matter and carries no weight as persuasive authority. This case

involves one plaintiff and two defendants and their various affiliated entities in one Court. The Orders appealed are based on Kentucky law and Kentucky Civil Rules CR 36.01 and CR 36.02. The district judge's order in *Rhone-Poulenc Rorer* put *an entire industry* at risk of facing thousands of plaintiffs and $25 billion in potential liability. Purdue does not encounter these same risks. The Commonwealth is the only plaintiff.

Purdue paints itself as being victorious in every litigation it has faced. This is completely false. As far as the Commonwealth is aware, Purdue has never gone to trial over its marketing and promotion of OxyContin and it fails to mention the numerous cases it has settled to avoid trials including the criminal case in the WDVA and a lawsuit brought by the State of West Virginia. All of its cases Purdue cites in its brief occurred prior to the criminal guilty pleas of Purdue and its top three executives, to its admissions of illegal conduct in the Agreed Statement of Facts, and to its payment of $600 million in monetary sanctions.

To bolster its argument that it is in a special circumstance, Purdue cites to two cases from the Western District of Virginia, where it pled guilty. However, it selectively quotes the two opinions, neither or which has any precedential value, and attempts to frame itself as having special circumstances where none exist. First, the Western District of Virginia rejected the third-party payor motions objecting to the plea agreement because the restitution process would become unduly complicated and would prolong the sentencing process and found that the delay of litigation by the putative victims to prove causation "would be contrary to the basic principles of our criminal justice system." *See United States v. Purdue Frederick Co.*, Inc., 495 F.Supp. 2d at 574.[10]

[10] The Court also stressed that "... the potential damage by the misbranding disclosed in this case was substantial and I do not minimize the danger to the public from this crime. The defendants voluntarily

Purdue also inaccurately portrays that Court's holding in *Boysaw v. Purdue Pharma*, 2008 WL 2076667 (W.D. Va. May 16, 2008)(R. at 131-133)(Ex. B). In the opinion Purdue cited, that Court merely denied a motion for summary judgment by a *pro se* plaintiff because the court held a genuine issue of material fact existed as to causation because the plaintiff, a *pro se* federal inmate, had used multiple opiates in addition to OxyContin. 2008 WL 2076667, at *2.

The fact that federal courts would not permit third-party payors to intervene in a criminal matter and denied summary judgment to a *pro se* inmate has nothing to do with the Commonwealth's claims in Pike Circuit. Nor does it have any bearing on the Court of Appeals determination that Purdue has an adequate remedy on appeal.

E. Speculative Juror Bias on Re-Trial Does Not Make Appeal Inadequate

Purdue also speculates that the remedy of appeal is inadequate because it could not receive a fair re-trial in Pike County if it prevailed on appeal. Purdue contends that the Pike Circuit Court Orders have "irrevocably poisoned" the setting for a re-trial, and that the Attorney General's and the media's public discussion of the admissions compounds matters. (Purdue Br., at 21-23.) Purdue claims that appeal would not be adequate to erase the misperception that it caused harm and admitted to causing harm, which a "highly-publicized verdict" would "inevitably" create. (*Id.*, at 23.) The Court of Appeals was correct in flatly rejecting this argument: "Purdue's concerns regarding prospective jury bias if the case is remanded by an appellate court is likewise faced by any litigant in a high-profile case and one curable by proper voir dire or change of

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accepted responsibility over this business enterprise, for which they were generously rewarded." 495 F.Supp. 2d at 576. The Court did point out that it would have to determine whether an alleged victim was directly and proximately harmed by the misbranding offense in order to award restitution under the Victim and Witness Protection Act or the Mandatory Victims Restitution Act, neither of which the Commonwealth asserts in Pike Circuit Court, but that was not the reason for denying the procedural motion

venue." (R. at 1132.) There is no law that supports Purdue's argument.

V. PURDUE HAS NOT SHOWN IRREPARABLE HARM OR THAT THIS CASE IS A RARE "CERTAIN SPECIAL CASE"

Purdue must also show it has suffered irreparable injury as the result of the Pike Circuit Court Orders.[11] *Fritsch v. Caudill,* 146 S.W.3d 926, 928 (Ky. 2004).[12] Conceding that it cannot show irreparable injury, Purdue tries to shoehorn this case into the very rare "certain special cases" exception to the requirement. To do so, Purdue must show "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, ***and*** correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Jones v. Costanzo,* 393 S.W.3d 1, 4 (Ky. 2012)(emphasis in original).

There is, however, ample precedent for both orders and the Pike Circuit Court did not err. The "advisory opinion" exception Purdue proposes would open the floodgates to nearly all aggrieved litigants. Purdue's arguments completely undermine the primary rationale of the "certain special cases" exemption – to assist in the broader efficiency and overall administration of the judiciary.

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[11] The Court of Appeals did not make any findings or rulings on whether or not this case fits into the "certain special cases" exception, but Purdue argues it extensively in its appellate brief.

[12] Several other cases, which on their face appear to be worthier of writ consideration, put this case into perspective. *See Osborn v. Wofford*, 39 S.W.2d 672, 674 (Ky. 1931)(no irreparable injury for a criminal defendant waiting until trial proceedings are complete, including conviction and possible imprisonment, before appealing a denial of a motion to suppress even though it involves question of constitutional law); *White v. Payne*, 332 S.W.2d 45, 50 (Ky. 2010)(death row inmate did not show irreparable injury of an infringement of constitutional rights that could be restored on appeal where he claimed his mental retardation should have prevented an examination by a doctor and should have made him ineligible for capital punishment); *Robertson v. Burdette*, 397 S.W.3d 886, 890-91 (Ky. 2013)(trial court's disqualification of a party's selected attorney and firm to act as administrator for an estate due to a conflict of interest was not irreparable injury); *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005)(no irreparable harm, but an adequate remedy on appeal, where pretrial order barred plaintiff from presenting claim of intentional infliction of emotional distress); *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 756 (Ky. 2005)(no irreparable injury where a company argued that contempt proceedings would have an immediate negative effect on its reputation); *Strauss v. Willett*, 2013 WL 5777068, *3 (Oct. 24, 2013)(unpublished)(financially ruinous hardships to a doctor caused by the probation of his practice of medicine did not justify a writ)(Ex. C); and *Lee v. George*, 369 S.W.3d 29, 34 (Ky. 2012)(no irreparable injury in denial of visitation time with children during pendency of appeal of a family court motion ruling).

A. The Orders Are Not a Miscarriage of Justice

Ample authority supports the Pike Circuit Court's decision. First, published authority supports that the requests for admission properly served in State court were again effective on remand. The Supreme Court of the United States has held and the former Court of Appeals has recognized that if federal jurisdiction is not sustained, the case will be remanded, with instructions that it be sent back to State court, as if no removal had occurred. *See Little Sandy Cooperage Co. v. Chesapeake & O. Ry. Co.*, 214 S.W. 912, 913 (Ky. 1919), *citing C. & O. Ry. Co. v. McCabe*, 213 U.S. 207, 218 (1909).

Second, published authority supports that the admissions were deemed admitted by operation of law. CR 36.01(2); *see Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4 (Ky. App. 2006). Finally, as discussed in detail *infra* in Section VI, on page 29, there is authority supporting the Circuit Court's discretion not to permit Purdue to withdraw the admissions. *Manus, Inc.*, 191 S.W.3d at 8.[13] Each unpublished case Purdue cites for its proposition that relief is required by extraordinary writ were all also cases decided ***on direct appeal, not writs.***[14] Thus there is no great miscarriage of justice.

B. Purdue's "Advisory Opinion" Request is Unworkable

Purdue cites *CSX Transp., Inc. v. Ryan,* 192 S.W.3d 345 (Ky. 2006), and *Sexton v.*

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[13] Further on this point, Purdue's cited unpublished case law is clear that even if the two-part test of CR 36.02 is met, it is within the discretion of the trial court to allow or deny withdrawal of admissions. *Burns-Mahanes v. Loeb*, 2005 WL 2241043, at *4 (Ky App. Sept. 16, 2005), *modified*, July 9, 2004(unpublished)(Purdue's Br., at 34, 38)(Ex. D).

[14] *Duncan v. Norton Suburban Hosp.,* 2004 WL 912136 (Ky. App., April 30, 2004), *modified*, July 9, 2004)(unpublished)(Purdue's Br., at 35-36)(Ex. E); *Loeb*, 2005 WL 2241043 (Purdue's Br., at 34, 38); *Bowland v.Gardner*, 2009 WL 2408345, at*2-*3 (Ky. App. Aug.7, 2009)(unpublished)(Purdue's Br., at 39)(Ex. F). Additionally, the published cases of *Childress v. Childress*, 335 S.W.2d 351 (Ky. 1960))(Purdue's Br., at 32); *Dressler v. Barlow*, 729 S.W.2d 464 (Ky. App. 1987)(Purdue's Br., at 32); *Mullins v. Commonwealth*, 262 S.W.2d 666 (Ky. 1953)(Purdue's Br., at 32); *Parrish v. Claxon Truck Lines*, 286 S.W. 2d 508 (Ky. 1955)(Purdue's Br., at 33); and *City of Louisville v. Slack*, 39 S.W.3d 809 (Ky. 2001)(Purdue's Br., at 33). Also, the published case of *Manus, Inc.*, 191 S.W.3d 4, which upheld an order deeming requests admitted, was a case brought on direct appeal. Not only does *Manus, Inc.* establish that the issue before the Court is one best handled by the normal appellate procedures, but also that an adequate remedy on appeal exists.

Bates, 41 S.W.3d 452 (Ky. App. 2001), as grounds for maintaining an original proceeding for extraordinary relief. Both cases discuss lack of precedent as a reason for reaching a decision on the merits, but both cases are readily distinguishable.

In *Ryan*, the issue was the applicability of CR 35.02 in the reciprocal exchange of physician reports in a Federal Employers' Liability Act action. 192 S.W.3d 345. The trial court ordered the plaintiff to produce a report and raw data of an expert medical witness originally listed but later withdrawn, which the plaintiff argued made the report and data privileged attorney work product. *Id.* at 347. The Court of Appeals held the plaintiff met the prerequisites for a writ before reaching the merits, and granted a writ by interpreting CR 35.02(1) as requiring only the exchange of written reports. *Id.* Notwithstanding plaintiff's contention of irreparable harm, on review this Court reached the merits and rejected the Court of Appeals' interpretation of CR 35.02(1) and reversed. *Id.* at 349.

In *Sexton,* the plaintiff brought an action for injuries suffered in an automobile accident. 41 S.W.3d at 454. The defendant sought an order for the plaintiff to be examined by a physician pursuant to CR 35.01. *Id.* The plaintiff objected to the particular physician, arguing he was a "defense doctor," and the trial court issued an order that the plaintiff, at the defendant's expense, be examined by another physician it chose. *Id.* The defendant sought a writ to prevent the enforcement of the trial court's order. *Id.* The Court of Appeals first determined that the defendant had made a threshold showing sufficient to prompt it to exercise its discretion on the merits. *Id.* at 455.

The *CSX Transp., Inc.* and *Sexton* decisions are inapposite. The rationale for considering a writ petition in the absence of controlling precedent on discovery matters is not applicable here. In those cases some information was going to make its way into the

hands of one party, which would arguably irreparably affect the rights of the other. Thus, the Courts had *reasons other than the lack of precedent* to reach the merits of the petition.

This Court has applied the "certain special cases" exception only "where the action for which the writ is sought would blatantly violate the law, for example, by breaching a tightly guarded privilege or by contradicting the clear requirements of a civil rule." *Chauvin*, 175 S.W.3d at 617.[15] Furthermore, Kentucky courts have only considered the merits of extraordinary writ petitions regarding discovery orders when "the order allows discovery," *Grange Mut. Ins. v. Trude,* 151 S.W.3d 803, 810 (Ky. 2004), because "[o]nce the information is furnished it cannot be recalled." *Bender,* 343 S.W.2d at 801. The Pike Circuit Court orders do not require Purdue to disclose privileged information that could not be recalled.

Purdue's theory that this Court should consider writ petitions when there is an issue of first impression is completely unworkable. The General Assembly passes hundreds of bills each session, all of which will be subject to interpretation for the first time after they are passed. The Criminal and Civil Rules change. Under Purdue's theory, this Court should review each new law and each rule change and use writ petitions as an avenue to issue advisory opinions and to take discretionary decisions made every day from District and Circuit Court judges.

If writs are considered in cases like this, the appellate courts will be inundated with petitions. *Mahoney,* 330 S.W.3d 75, 79. The primary rationale of the "certain special cases" exemption is to assist in the ***broader efficiency and overall administration*** of the judiciary. Granting Purdue's request will have the opposite effect.

[15] For instance, protection of the attorney-client privilege has been held to fall within the "certain special cases" exception. *Wal-Mart Stores, Inc. v. Dickinson,* 29 S.W.3d 796, 803 (Ky. 2000).

VI. THE PIKE CIRCUIT COURT DID NOT ERR

The matters within the requests for admission were deemed admitted by operation of law because of Purdue's failure to timely respond to them. The Civil Rules do not provide any right to a hearing when matters are automatically deemed admitted. In denying Purdue's motions to withdraw or amend the admissions, the Court properly exercised its discretion after full briefing and a lengthy hearing. Judge Combs gave Purdue all the process that the Civil Rules afford.

A. Kentucky Law Mandates the Consequences of a Party's Failure to Respond to Requests for Admission

Purdue contends the Pike Circuit Court's April 1, 2013 Order recognizing that the Requests for Admission were deemed admitted applied a rule not found in the Civil Rules or Kentucky case law. Purdue ignores Civil Rule 36.01(2), which provides:

> **The matter is admitted unless**, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers before the expiration of 45 days after service of the summons upon him. (emphasis added).

Likewise, CR 36.02 clearly states: "Any matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission." This Court and the Court of Appeals have repeatedly stated the effect of not responding to requests for admission. *See Berrier v. Bizer*, 57 S.W.3d 271, 278-79 (Ky. 2001)(reciting CR 36.01(2) and CR 36.02, defining "conclusively established," and stating matters admitted are judicial admissions); *Manus, Inc.,* 191 S.W.3d at 8 (reciting pertinent part of CR 36.01(2) and CR 36.02 in upholding summary judgment based on deemed admissions); and *Harris v. Stewart*, 981 S.W.2d 122, 124 (1998)(reciting CR

36.01(2) and pertinent part of CR 36.02, reiterating an inattentive party may run the risk of having a judgment entered against him based on failure to respond).

Purdue's own failure to timely respond triggered CR 36.01(2), and, by operation of law, the requests for admission were deemed admitted and conclusively established under CR 36.02. Purdue filed its motion to withdraw or amend its admissions, which the parties briefed and argued.[16] Purdue had ample opportunity and was heard.

Manus, Inc. 191 S.W.3d 4, supports the assertion that a trial court does not abuse its discretion in deeming admissions, which in that case were responded to about two weeks late, as conclusively established. As a result, the Pike Circuit Court was neither unfair nor erroneous in entering its April 1, 2013 Order. Purdue would have this Court deem this important component of discovery and the Civil Rules meaningless.

B. Requests Served Before Removal Are Effective Upon Remand

If federal jurisdiction is not sustained, the case will be remanded with instructions that it be sent back to State court as if no removal had occurred. *See Little Sandy Cooperage Co. v. Chesapeake & O. Ry. Co.*, 214 S.W. 912, 913 (Ky. 1919), *citing C. & O. Ry. Co. v. McCabe*, 213 U.S. 207, 218 (1909). When it appears a federal district court lacks subject matter jurisdiction, the Federal court must remand the case to State court, and the clerk of that court must mail a certified copy of the remand order to the clerk of the State court, which "may thereupon proceed with such case." 28 U.S.C. § 1447(c).

Courts have long established that the remand of a case terminates the suspension or interruption of the State court's jurisdiction, and revives the case in State court ***as it stood at the time of removal.*** *See, e.g., Dauenhauer v. Superior Court*, 307 P.2d 724,

[16] In fact, the motion was scheduled to be heard at a prior hearing on Purdue's change of venue motion that ran longer than expected. The Court rescheduled a new motion hearing so the parties would have ample time to present argument.

725-726 (Cal. App. 1957)(holding that remand terminated the state of suspension caused by removal and the plaintiff had the unexpired time provided in state court before removal to file demurrers and motions to strike).[17]

Purdue argues that its removal of the case rendered the discovery requests permanently "null and ineffective upon removal", citing to *Wilson v. Gen. Tavern Corp.*, 2006 WL 290490 (S.D.Fla. Feb. 2, 2006)(unpublished)(Ex. G)(R. at 63-64) and *Steen v. Garrett*, 2013 WL 1826451 (D.S.C. Apr. 30, 2013)(unpublished)(Ex. H)(R. at 66-69). The *Steen* case cites *Wilson*, which relies on *Riley v. Walgreen Co.*, 233 F.R.D. 496 (S.D. Tex. 2005). *Riley*, the only published authority therein, did not include the words "null" or "void." The *Riley* Court held the uncontroversial position that Federal Civil Rule 26(f) prohibits discovery in Federal court prior to a discovery conference and, therefore, the discovery served in State court before removal is not enforceable in Federal court. 233 F.R.D. 496. None of these cases address discovery upon remand to state court, but rather concern the effect of removal on discovery under the federal rules ***if the case remains in federal court.*** No authority supports the argument that properly-served discovery forever ceases to exist upon removal and must be re-served in the State court on remand.

The Commonwealth does not dispute that discovery served prior to removal could not be enforced in Federal court until after a Federal Civil Rule 26(f) conference. The Federal Civil Rules do not apply in State court and Federal Civil Rule 26(f) has no

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[17] See also *Peoples Trust and Sav. Bank v. Humphrey*, 451 N.E.2d 1104, 1108-09 (Ind. App. 1983)(finding the 10-day time limit under a state procedural rule was *tolled* during the removal of an action to federal court when the action was later remanded to state court) (emphasis added); *Doerr v. Warner*, 76 N.W.2d 505, 512 (Minn. 1956)(finding removal does not terminate state court jurisdiction, but merely stays or interrupts it, and remand revives it); and *Cotton v. Federal Land Bank of Columbia*, 269 S.E.2d 422, 423 (Ga. 1980)(concluding that where an answer simultaneously filed with removal was timely, the state court's jurisdiction was suspended until remand, at which time the state court resumed jurisdiction and the case stood as it did when removed), *citing Allen v. Hatchett*, 86 S.E.2d 662, 576 (Ga. App. 1955)(holding that because the case was removed 22 or 23 days after service of process, it was not in default when back in state court after remand and defendant could file defensive pleadings).

corollary Kentucky Civil Rule. When the case returned to Pike Circuit Court, no rule required re-service or made the properly-served requests unenforceable there.

Additionally, Purdue raised a red herring argument that the discovery must be ineffective in State court because it finds it confusing to count its deadline to respond.[18] Its proposed rule that parties should re-serve discovery is found nowhere in the case law or the rules. This Court should not create a new rule shifting a discovery responsibility to the serving party merely because Purdue failed to respond in this case.

C. Purdue is Responsible for the Failure to Respond to the Requests

Purdue's letter to the Commonwealth after removal asserting that "discovery requests" must be re-served after a Federal Rule of Civil Procedure 26(f) conference did not constitute agreement by the Commonwealth that the requests for admissions would have to be re-served upon remand. Purdue cannot construe the lack of response as agreement on the status of discovery following remand because **Purdue's letter did not address that issue**, nor did it ask the Commonwealth to agree the discovery was "void".

Purdue implies the Commonwealth misled it about whether the discovery would be re-served. The Commonwealth did decline to enter into an extensive scheduling order Purdue offered after remand. Declining to agree to a discovery end date or deadlines for dispositive motions prior to any appearance before Pike Circuit Court, while being forced to litigate the case in other jurisdictions, is no indication that the Commonwealth suggested or agreed to an unofficial stay of all proceedings. Discovery begins by operation of the Civil Rules.[19]

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[18] Purdue does not actually argue it miscounted. This is not raised by the facts of this case.

[19] CR 30 and CR 31 provide for discovery to begin "After commencement of the action", without any other triggering event. CR 33 and CR 36 provide discovery may be served on Plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party." There are no

It was not the Commonwealth's responsibility to remind Purdue of outstanding discovery requests. Purdue characterizes this as "gotcha" litigation, but the Commonwealth merely followed the Civil Rules and expected Purdue would do the same. Purdue characterizes its position as encouraging cooperation between counsel, but it seeks to shift a basic responsibility of meeting discovery deadlines to opposing counsel.

D. The Record and Authority Support the Pike Circuit Court's Orders

The Pike Circuit Court did not abuse its discretion. Its decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Manus, Inc.*, 191 S.W.3d at 8. Precedent supports the Order denying Purdue's motion to withdraw. On a discovery issue, where the trial court has not abused its discretion, its decision must be upheld. *Id.*

Purdue's motion to withdraw or amend its admissions was committed to the discretion of the trial court. As Civil Rule 36.02 plainly states: The court *may* permit withdrawal or amendment when: (1) the presentation of the merits of the action would not be subserved thereby; and (2) the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. (Emphasis added). *Even if* a court finds that a party seeking to withdraw or amend its admissions has met the two-pronged test under the Rule, the trial court *still has discretion* to deny the request. *See In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001); s*ee also Burns-Mahanes* 2005 WL 2241043, at *4.

Purdue tries to distinguish the *Manus, Inc.* case because the defendant filed a motion to rescind the order deeming admitted, rather than a motion to withdraw. 191 S.W.3d 4. However, *Manus, Inc.* acknowledged and recited the factors to be considered under CR 36.02 before discussing the failings of Manus, Inc.'s counsel. *Id.* at 8. The

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additional discovery-triggering events after a party is brought into an action.

Manus, Inc. Court does note that Manus, Inc. did not file a motion to withdraw the admissions, but following upon analysis of the rule deeming the matters admitted and discussion of the negligence of counsel in allowing that to occur, it would be perverse to read *Manus, Inc.* as finding that the problem was simply how the motion to undo the admissions had been styled. *Id.* at 8-9. [20]

In addition, ample federal authority finds permitting withdrawal is within the trial court's discretion even where the two-part test is met. *See* e.g. *Covarrubias v. Five Unknown INS/Border Patrol Agents*, 192 Fed.Appx. 247 (5th Cir. 2006)("Regardless of the two-factor test, given the plaintiffs' lack of diligence in pursuing this suit, the district court did not abuse its discretion in denying the motion"); and *Donovan v. Carls Drug Co., Inc.*, 722 F.2d 727 (2nd Cir. 1983)(upholding admission "[b]ecause the language of the Rule is permissive, the court is not required to make an exception to [Federal] Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule"). Allowing withdrawal of admissions is discretionary and fact-specific.

After receiving thorough briefs on the matter, the Pike Circuit Court heard oral argument on the factors under CR 36.02. The Court then exercised its discretion and denied Purdue's motions in its September 25, 2013 Order, in which the Court recited the motions before it and stated it had conducted oral argument, citing to the video record.[21]

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[20] Purdue's argues that the unpublished cases it has cited undo the premise that matters not timely responded to are deemed admitted, because each of the unpublished cases it cited allowed withdrawal. Purdue is essentially arguing that its unpublished authority and the procedure in *Manus, Inc.* add up to the proposition that a motion to withdraw *must be granted*. This is contrary to the language of the rule.

[21] On page 36 of its brief, Purdue argues the Order lacked the requisite findings, which is reversible error. In the unpublished case Purdue cites, *Duncan v. Norton Suburban Hosp.*, 2004 WL 912136, at *3, the Court of Appeals stated that it "observed" that trial court did not make a finding of prejudice and failed to consider whether the merits of the case would be subserved by the amendment of the admissions as required by CR 36.02 *after* the Court found such amendment would promote the presentation of the case upon the merits and that appellee had not shown sufficient evidence of prejudice. The Court found the trial court committed error by failing to allow the amendment of the admissions, which were deemed admitted

1. The admissions will not affect the presentation of the merits

Holding a party to an admission does not subserve the presentation of evidence merely because it would be dispositive of an issue. In *Berrier v. Bizer*, this Court recognized that matters admitted under Kentucky Civil Rule 36.01 are "judicial admissions," having "the effect of removing a fact or issue from the field of dispute" and are "conclusive against the party and may be the underlying basis for a summary judgment, a directed verdict, or a judgment notwithstanding the pleadings." 57 S.W.3d 271, 279, quoting R. Lawson, *The Kentucky Evidence Law Handbook§* 8.15, at 386 (3d ed. 1993). Published opinions in Kentucky reflect that the Rule is not an idle threat, and failure to respond to requests for admissions may result in a dispositive judgment. *See Manus, Inc.*, 191 S.W.3d at 8 (upholding summary judgment on the basis of requests for admissions deemed admitted because of the failure of the defendant to timely respond); and *Harris,* 981 S.W.2d 122, 124 (affirming denial of summary judgment, but reiterating that an inattentive party served with a request for admission may run the risk of having a judgment entered against him based on failure to respond).

Nor does it subserve the presentation of the merits of the case to hold Purdue to admissions merely because it *wishes* to present contrary evidence, particularly where it previously admitted facts under oath in its criminal guilty plea. Purdue bore the burden to satisfy this factor before the Pike Circuit Court and it did not. It suggests that requests for admissions should only address non-controversial issues that a party would readily admit, but Purdue *wants* to dispute issues about which there is no real dispute.

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under CR 36.01, and that the trial court improperly granted summary judgment because it erroneously relied on admissions the Court viewed as being less than dispositive of liability. The Court did not hold the trial court erred because of its findings, and the opinion does not indicate the trial court conducted a hearing. Further, this Court rejected a similar argument concerning the Pike Circuit Court's Order certifying a class in *Merck & Co., Inc. v. Combs*, 2011 WL 1104133, at *4.

The Commonwealth argued the requests for admission are based on pleadings Purdue made in federal court when it and three of its executives entered guilty pleas over the marketing of OxyContin. Purdue complains that some of the admissions go further than the conduct in its guilty plea, and claims certain admissions are factually untrue and violate its due process rights. Purdue's Admission No. 15 that it did not develop an abuse-deterrent formulation was true for most of the time period of Purdue's illegal acts, and launch of a new formulation in 2010 does not relieve Purdue of its liability for its illegal conduct.[22]

Purdue also argues that certain other admissions are untrue because it has prevailed in other courts on related issues like causation and failure to warn. Purdue cites cases which all occurred prior to Purdue's guilty plea and accompanying pleadings in 2007, and again misrepresents and overstates *United States v. Purdue Frederick Co., Inc.*, 495 F.Supp.2d 569 (W.D.Va. 2007) and *Boysaw v. Purdue Pharma*, 2008 WL 2076667 (W.D. Va. May 16, 2007)(R. at 131-133). Further, the cases to which Purdue cites have no authority in this Court or in Pike Circuit Court. Those cases involved different parties, different claims and different courts than those the Commonwealth asserts. Consequently, those other cases can have no *res judicata* effect on the Pike Circuit Court action, and the admissions have not been disproved. The Pike Circuit Court heard Purdue's arguments, read extensive briefs, and allowed Purdue to present evidence. After giving Purdue all the process it was due, the Pike Circuit Court exercised its discretion under CR 36.02.

2. Withdrawal would prejudice the Commonwealth

The Court of Appeals did not, essentially or otherwise, find that the Purdue's

[22] After launching the new formula Purdue filed a Citizen Petition with the FDA asking, and accomplishing, that no generic versions of its prior formula be approved *for safety reasons*.

motion to withdraw was without any prejudice to the Commonwealth under CR 36.02. It specifically stated that it did not reach the merits. (R. at 1127). Instead, the Court of Appeals stated that "a legitimate question is presented whether the deadline passed for responding to these admissions after remand from the federal court and without any prejudice to the Commonwealth." (R. at 1129).

The Commonwealth did show it was prejudiced, although under 36.02 the Court had discretion to deny the motion to withdraw even if it had not found prejudice. Kentucky law does not require justifiable reliance in order to find prejudice and the Commonwealth is prejudiced by unavailability of evidence and witnesses. Significantly, Purdue's former General Counsel, Howard Udell, who pleaded guilty in 2007 and paid $8 million dollars in the global settlement, died last year between briefing and argument on the admissions. Udell was intimately involved in Purdue's response to problems surrounding OxyContin, including meeting with various Federal, State and local officials and community groups throughout the nation, and concealing the truth about OxyContin and Purdue's marketing during such meetings.[23] His death permanently prevents the Commonwealth from taking his testimony at deposition or at trial. It is significant and prejudicial that the Commonwealth is now limited to his prior testimony and will never have the opportunity to question Udell specifically about the marketing of OxyContin, including in Kentucky. A Pike County jury will never be able to see live testimony of a man who was a primary orchestrator of Purdue's illegal marketing that caused an epidemic in Kentucky.

[23] *See* Barry Meier, Pain Killer: A "Wonder" Drug's Trail of Addiction and Death (Barry Meier, ed., Rodale 2003).

Further, Udell likely had personal knowledge regarding the admissions.[24] A letter memorializing his visit to Kentucky in 2005 shows he was intrinsically involved in Purdue's illegal activities. *See* Howard Udell Letter, May 17, 2005. (R. at 908-915.). It also shows that he made misrepresentations and told half truths to the Commonwealth. Even if other witnesses have knowledge, Udell was General Counsel and one of three executives to plead guilty. The Commonwealth would have been entitled to *his* testimony and is prejudiced in never being able to obtain it.

The Commonwealth has also noted that the passage of time has deprived it of other witnesses not easily named. Commonwealth witnesses who work with those affected by OxyContin addiction have noted that potential witnesses have died, some directly as a result of OxyContin. Laws protecting the privacy of those who seek treatment prevent the names from being disclosed without permission of the patients; permission they are no longer here to give. The prejudice to the Commonwealth from the loss of these witnesses and their evidence is not rendered speculative by the absence of their names. Beyond what the Commonwealth has learned in investigation, there can be no doubt: more than 1,000 people per year in Kentucky die from overdoses.[25]

The prejudice the Commonwealth would suffer is not limited to the 11 days between the Order recognizing the matters were deemed admitted under CR 36.01(2) and Purdue's late, proposed responses. For five-and-a-half years, Purdue dragged the

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[24] For example, Admission No. 6 regards Purdue's knowledge OxyContin was being abused and diverted. This fact was included in the Statement of Facts attached to the guilty plea Udell signed. The Commonwealth would have been entitled to explore his personal knowledge of this highly-relevant fact.

[25] Terry Bun & Svetla Slavova, Kentucky Injury Prevention and Research Center, Drug Overdose Morbidity and Mortality in Kentucky, 2000 – 2010: An Examination of Statewide Data, Including the Rising Impact of Prescription Drug Overdose on Fatality Rates, and the Parallel Rise in Associated Medical Costs 1, 14, 32, 34, 48-49 (2012), http://www.mc.uky.edu/kiprc/PDF/Drug_Overdose_Morbidity_and_Mortality_in_Kentucky_2000_-_2010-final.pdf.

Commonwealth into various jurisdictions in an effort to avoid the jurisdiction the Commonwealth chose. On the day the case finally returned, Purdue continued to try to evade the jurisdiction of Pike Circuit Court. All the while, Purdue did not answer the requests for admission, even though it took Purdue only 11 days to serve its late, proposed responses. The Commonwealth has been prejudiced by the delay tactics. Judge Combs was certainly reasonable in considering these facts in exercising his discretion.

E. Abbott Presented Substantially Different Arguments than Purdue

Purdue attempts to differentiate Abbott by arguing that Abbott stood in the same position when arguing the motions on the admissions. Abbott's admissions were also deemed admitted by operation of CR 36.01(2) after it failed to respond to the requests.

At the hearing on the motions in Pike Circuit, Abbott's counsel distinguished Abbott from Purdue: "It's important for the Court to recognize what Abbott did not do. Abbott did not sell OxyContin. Abbott did not design OxyContin, did not manufacture it, did not label or package it, did not distribute it, did not patent it, did not develop it." (R. at 371; Tr. of Hearing, 24:1-5, Sept. 25, 2013.) Abbott's counsel further differentiated Abbott stating: "I just want to make it perfectly clear that Abbott was not a party to any criminal plea, was not a party to any agreed statement of facts that the Commonwealth claims closely parallels its request for admissions in this case, was not even a party to that case." (R. at 377; Tr. of Hearing, 46:12-17, Sept. 25, 2013.)

It is disingenuous to argue Abbott's motions were based on the same facts when Abbott vigorously advanced these distinctions. Pike Circuit Court's contrasting rulings demonstrates its specific consideration of the motions to withdraw or amend, rather than a lack of competence. While the Commonwealth disagrees with the Pike Circuit Court's

ruling as to Abbott, it realizes it has an adequate remedy to appeal if necessary.

VII. CASES FROM OTHER JURISDICTIONS ARE NOT PERSUASIVE

In dicta, the Court of Appeals referenced five cases from foreign jurisdictions it would be "inclined" to follow if the law of writs in Kentucky was not firmly-entrenched. (R. at 1129-1132.) Purdue cites these and asks this Court to disregard decades of precedent and adopt the law of other jurisdictions for just for this case, requesting a new class of writs to review trial court decisions that are dispositive of issues. As the Court of Appeals acknowledged, each is contrary to longstanding Kentucky law – but moreover, each is also distinguishable from the facts of this case.

In *Hinkle v. Black*, 262 S.E.2d 744, 751 (W.Va. 1979), the Court denied a writ after concluding the trial court did not abuse its discretion in transferring cases before it. The trial court transferred seven civil actions to another county where twenty actions had been filed and consolidated. *Id.* at 745-46. The Court stated the two criteria in West Virginia for the issuance of a writ and rule to show cause: (1) adequacy of another remedy such as appeal and (2) economy of effort among litigants, lawyers and courts. *Id.* at 748. A question of good faith surrounds both criteria – if a writ petition is filed to delay or confuse and confound the legitimate workings of the process, the court will deny a rule to show cause why the writ should not issue. *Id.*

The Court found the trial court acted properly, and noted that if it had not there would have been no effective remedy by appeal. *Id.* at 749. The petitioners argued their "remedy" for transfer would be appealing any verdict in order to seek a new trial in their chosen venue. *Id.* The Court found that the adequacy of a remedy by appeal was wholly theoretical and not practical. The Court stated appeal of a crucial, but erroneous legal

ruling is frequently inadequate, particularly if it recognized that part of adequacy had to do with expense and time. Settled Kentucky law is clear that appeal is not inadequate based on time and expense of litigation.

Unlike in West Virginia, in Kentucky the burden of persuasion is squarely on the petitioner. In Kentucky the petitioner must prove both requirements for a writ where it is alleged the trial court acted erroneously within its jurisdiction. Here the economy consideration is not the litigants or court in a single case but the efficient administration of justice. The *Hinkle* Court echoed this fear that writs may become "a dragnet by means of which questions appropriate for the trial court will erroneously be brought" before it. *Id.* at 749-50. As the cases in footnote 12 herein clearly show, Kentucky courts have denied writs in cases where the petitioner alleged substantial rights were at stake, including where a criminal defendant faced trial, verdict, sentencing, and imprisonment before appealing a denial of a motion to suppress. *See Osborn*, 39 S.W.2d 672, 674.

In *Thermorama, Inc. v. Shiller*, 135 N.W.2d 43, 48 (Minn. 1965), the Court discharged the writ it had issued after finding that compelling a defendant to open its business records to a plaintiff, subject to protective orders, was within the trial court's discretion. The Court stated that the extraordinary remedy of prohibition should be used only: (1) where it appears the court is about to exceed its jurisdiction or where it appears the court's action relates to a matter that is decisive to the case; (2) where the court has ordered the production of information clearly not discoverable and there is no adequate remedy at law; or (3) in rare instances where it will settle a rule of practice affecting all litigants. *Id.* at 46. The Court stated the use of a writ to review pretrial orders was confined to limited areas, such as where an attorney must subject himself to a contempt

finding before he can obtain relief. *Id.* at 46-47. The Court wrote it had neither the time nor the inclination to review other than exceptional pretrial orders. *Id.*

Unlike in *Shiller*, the Pike Circuit Court Orders do not subject Purdue's counsel to a finding of contempt. The Orders did not require Purdue to turn over records. As the Court in *Shiller* ultimately found, Purdue has not shown it will suffer irreparable injury. Purdue must establish no adequate remedy exists and great injustice *and* irreparable injury will result without a writ. Purdue has established neither, much less both.

In *Golden v. Crawford*, 165 S.W.3d 147 (Mo. 2005), the Court quashed a preliminary writ after holding it was appropriate for the trial court to reconsider the defendant's summary judgment motion under the proper immunity law. The Court wrote that the discretionary writ may be appropriate to prevent unnecessary, inconvenient, and expensive litigation, but also stated that a writ is particularly appropriate where the facts of a case are uncontested and a party has an absolute defense of immunity. *Id.* at 148. There is no absolute defense at issue in this matter.

Finally, in *Davis v. Traub*, 565 P.2d 1015 (N.M. 1977) the Court granted a writ to quash a criminal indictment because unauthorized people were present during the grand jury investigation. The Court in *Davis* stated that under some exceptional circumstances it would grant a writ where irreparable harm, extraordinary hardship, costly delays or unusual burdens of expense would result. *Id.* at 1017. Unlike here, that case involved important historical rights that protected one accused of a crime. *Id.* Purdue's circumstance is not exceptional. Purdue has not shown irreparable injury, and its expense of litigation argument is not sufficient under Kentucky law for a writ to issue.

A. Purdue's reliance on distinguishable Texas law is misplaced

In dicta, the Court of Appeals referenced two Texas cases. Purdue uses these and other Texas cases to ask this Court to change Kentucky law to what it claims exists in Texas –although even Texas law on this point appears far from settled.

In *Walker v. Packer*, 827 S.W.2d 833, 836 (Tex. 1992), the trial court denied the petitioner's requests to obtain documents from the defendant and a non-party. The Supreme Court denied the writ as to the defendant because petitioner had not presented a sufficient record. *Id.* at 837. The Court denied the writ as to the non-party because, even though the trial court clearly abused its discretion in misapplying precedent, the petitioner had an adequate remedy by appeal. *Id.* at 840-44. The Court stated that mandamus issues only to correct a clear abuse of discretion or the violation of a legal duty when there is no other adequate remedy. *Id.* at 839. The extraordinary remedy is available in limited circumstances, and only in situations involving manifest and urgent necessity, not for grievances that other remedies address. *Id.* at 840. After disapproving of authorities abolishing or relaxing the requirement of inadequate remedy by appeal, and noting that without it mandamus would cease to be extraordinary, the Court held that an appeal "is not inadequate merely because it may involve more expense or delay than obtaining a writ." *Id.* at 842. Interference by appellate courts is justified only when parties stand to lose their fundamental rights. *Id.* The Court discussed three discovery situations where a party may not have an adequate appellate remedy from a clearly erroneous order, including where an order vitiates or severely compromises a party's ability to present a viable claim or defense at trial. *Id.* at 843. In such a situation, the petitioner must show more than the delay, inconvenience or expense of an appeal. *Id.* She must establish the

effective denial of a reasonable opportunity to develop the merits of her case, so that the trial would be a waste of judicial resources. *Id.*

Walker mirrors Kentucky law in that a petitioner must show he has no adequate remedy by appeal, which is mere expense or delay as Purdue argues here. However, the Pike Circuit Court's Orders are not clearly erroneous and did not take a fundamental right from Purdue. *Purdue failed* to respond to properly-served requests for admission. Finally, Purdue is not without any defense; it has raised affirmative defenses such as *res judicata*.

In the unpublished *In re Am. Gunite Mgmt. Co., Inc.*, 2011 WL 4550159 (Tex. App.-Fort Worth Oct. 3, 2011)(unpublished)(Ex. I), the Court conditionally granted a writ after finding the trial court abused its discretion. Tex.R. Civ.P. 198.2(c) automatically authorizes deemed admissions when a party fails to respond to requests for admissions, without the necessity of a court order. *Id.* at*1. Petitioner claimed it missed the deadline by mistake and responded to the requests for admissions 10 days late, four months after the suit began. *Id.* at *2. The Court stated that requests for admissions were not intended to be used as a demand on a party to admit or deny she had no cause of action or defense, but to enable parties to eliminate uncontroverted matters and cited due process principles. *Id.* at *1.

Although Purdue's delay tactics to avoid the jurisdiction of the Pike Circuit Court for years without answering the requests for admissions may be viewed as flagrant bad faith or callous disregard for the rules, that is not the standard in Kentucky.[26] Purdue

[26] Along with the judicially-created standard for withdrawal or amendment of admissions, Tex.R. Civ.P.198.3 provides, in part: A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if: (a) the party shows good cause for the withdrawal or amendment; and (2) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.

bases its failure on an incomprehensible interpretation of correspondence with the Commonwealth and the effect of remand. The Pike Circuit Court gave the parties ample due process by accepting substantive briefs and allowing lengthy oral argument. This unpublished Texas case does not support changing Kentucky law for Purdue.

In *In re Rozelle*, 229 S.W.3d 757 (Texas App.-San Antonio 2007), the Court found the trial court abused its discretion in denying petitioner's motion to withdraw deemed admissions where petitioner failed to respond to requests served on him when he had no counsel. The requests were served on the petitioner four days after his first counsel withdrew from the case. *Id.* at 759. The petitioner mistakenly believed he had longer to respond, then when he realized his responses were due he still did not respond because he was not sure what to do without advice from his attorney, and forgot about the deadline while trying to find a new attorney and dealing with family issues. *Id.* at 760.

On appeal, the Court held that the trial court erred in not applying the due process standard once it recognized the merits-preclusive effect of the deemed admissions, and because the record contained no evidence of flagrant bad faith or callous disregard for the rules. *Id.* at 764. The Court also found the record contained nothing to suggest the parties were unable to prepare for trial without the deemed admissions. *Id.* at 764.

Throughout this litigation, the same able counsel has represented Purdue in the various forums to which it has taken this case. As discussed, Pike Circuit Court gave the parties ample due process and Purdue and its counsel were heard.

In the case of *In re Spooner*, 333 S.W.3d 759, 765 (Tex. App.-Houston [1st Dist.] 2010), the Court held the trial court did not properly apply the law when determining whether statements the petitioners made in the argument section of summary judgment

motions constituted judicial admissions. The Court also held the case was one of "those exceptional cases justifying mandamus relief," because the order essentially determined liability and stripped relators of their ability to mount a meaningful defense, even though they did not judicially admit the facts. *Id.* at 766. Failing to correct the error would have so skewed the litigation process as to make appeal inadequate. *Id.* The order could be reviewed on appeal, but the denial of the petitioners' right to offer contrary evidence would have skewed the proceedings and compromised the presentation of their defense in ways that were unlikely to be apparent in an appellate record. *Id.* The Court also stated, while it would not be sufficient standing alone, it could consider the waste of judicial resources and the additional expense when determining the adequacy of appeal. *Id.* at 766-67. The potential waste of private and public resources, combined with a skewing of the proceedings, hampering the ability to present defenses and the possibility of not being able to successfully prosecute and appeal, rendered appeal inadequate. *Id.*

In contrast to *In re Spooner* the Pike Circuit Court Orders do not bar Purdue from raising any affirmative defense, or so skew the trial court proceedings that it will not be able to present a record on appeal of an adverse judgment. Indeed, the Pike Circuit Court granted Purdue's motion to amend its Answer to add the affirmative defense of *res judicata* **after** it denied the motion to withdraw or amend the admissions. Finally, the record on Purdue's admissions is abundant for review on appeal.

Purdue's brief implies (as it did in the trial court with unpublished Kentucky cases) that Texas courts always reverse a trial court's denial of a motion to withdraw or amend admissions. To the contrary, Texas case law includes cases upholding the denial of withdrawal of admissions and judgments on the merits based on such admissions. For

example, in *Ramsey v. Criswell*, 850 S.W.2d 258, 259-260 (Tex. App.-Texarkana 1993), the Court affirmed the trial court's rejection of a defendant's argument that he failed to respond to requests for admission until two days after the deadline because of his illness and his counsel's absence from town on the last day to file answers. The Court held that in view of the lack of evidence tending to show good cause for the failure to timely file the answers, it could not find the trial court abused its broad discretion in denying withdrawal of the admissions. *Id.* The Court also affirmed the granting of summary judgment based on the deemed admissions because the defendant was deemed to have admitted the elements of the plaintiff's claim. *Id.* at 260.[27] As in this line of cases, Purdue offers nothing but poor excuses for why it didn't respond.

B. Other Cases Purdue Cites are Inapposite

In *Omaha Indemnity Corp. v. Superior Court*, 209 Cal. App. 3d 1266, 1274 (Cal. App. 2nd Dist. 1989), the Court issued a writ ordering the trial court to grant a motion to sever. The Court pointed out that approximately 90 percent of writ petitions are denied, and cautioning against writ relief "at the drop of a hat" so that in every ordinary action a defendant could not halt trial court proceedings whenever he chose and trap courts in an "appellate gridlock." *Id.* at 1271-73. After listing six general criteria for deciding the

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[27] *See also Curry v. Clayton*, 715 S.W.2d 77 (Tex. App.-Dallas 1986)(affirming denial of motion to strike deemed admissions and summary judgment where attorney claimed his busy schedule delayed responses); *Alexander v. State*, 2011 WL 3836452 (Tex. App.-Fort Worth Aug. 31, 2011)(unpublished)(Ex. J)(finding no abuse of discretion in denying withdrawal of admissions where opposing parties' attorneys told him to hire counsel and to respond to requests in writing, and finding deemed admissions are the consequence of missing a procedural deadline, not a sanction for discovery abuse); *Van Hoose v. Vanderbilt Mortgage and Finance, Inc.*, 2009 WL 1256646 (Texas App.-Austin May 8, 2009) (unpublished)(Ex.K) (affirming denial of withdrawal of deemed admissions and granting of summary judgment based on admissions where trial court found the defendants' excuse of a medical condition requiring avoidance of the stress of court proceedings was not good cause); and *Singh v. McGraw-Hill Info. Systems Co.*, 1991 WL 104022 (Tex. App.-Dallas June 10, 1991)(unpublished)(Ex. L)(finding the trial court did not abuse its broad discretion in denying withdrawal of deemed admissions, which resulted in summary judgment, where attorney's claims of being out of the country, a change in personnel and losing the file did not establish good cause).

propriety of a writ,[28] the Court found the Supreme Court's order directing issuance of a writ meant it had determined the petitioner lacked an adequate remedy. *Id.* at 1273-75.[29]

In *St. Mary v. Superior Court*, 223 Cal. App. 4th 762 (Cal. App., 4th Dist. 2014), the Court held the trial court erred in deeming 41 of 105 requests for admission admitted after a hearing required by California Code of Civil Procedure 2033.280(a). The petitioner had twice requested a two-week extension to respond to the requests, the latter of which the opposing party rejected the day after the response deadline. *Id.* at 767. In California, the propounding party must move to have requests deemed admitted when the party served does not timely respond. *Id.* at 775-76. If the other party does not file proposed responses prior to a hearing on the motion, the court must order the requests deemed admitted and impose monetary sanctions on the party or its attorney. *Id.* at 776. The Court stated that requests for admission seek to eliminate the need for proof, to limit triable issues and spare the parties the burden and expense of litigating undisputed issues, and that sometimes the admissions obtained will leave an admitting party vulnerable to summary judgment. *Id.* at 775. Matters admitted or deemed admitted are conclusively established and not subject to being contested through contradictory evidence. *Id.*

The Court found the trial court abused its discretion in its piecemeal approach to

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[28] The criteria, applied on a case-by-case basis, are: (1) the issue tendered in the petition is of widespread interest or presents a significant and novel constitutional issue; (2) the order deprived petitioner of an opportunity to present a substantial portion of his cause of action; (3) conflicting trial court interpretations of the law requires a resolution of the conflict; (4) the order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case; (5) the petitioner lacks an adequate means to attain relief, such as by appeal; and (6) petitioner will suffer harm or prejudice in a manner than cannot be corrected on appeal. *Id.* at 1273-74.

[29] *Roden v. AmerisourceBergen Corp.*, 130 Cal. App. 4th 211, 218-221 (Cal. App., 4th Dist. 2005), recited the general criteria from *Omaha Indemnity Corp.* before denying a petition for a writ of mandate. The Court ruled that the trial court's order permitting post-judgment discovery regarding the amount of employment benefits the petitioner was entitled to was a non-appealable order because it was not an order determining the amount of benefits. *Id.* at 217-18. The petitioner had an adequate remedy at law because such future orders would be entered. *Id.* at 217-220.

the proposed responses and in its misapplication of the pertinent Code section concerning responses. *Id.* at 779-783. The Court wrote of the "potentially drastic consequences" of having a request for admission deemed admitted and noted that the device is not meant to provide a windfall. *Id.* at 784.

As *St. Mary* illustrates, the California Civil Code governing admissions differs from the Kentucky Civil Rules. The Kentucky Civil Rules do not require a motion to deem requests admitted; they are deemed admitted as a matter of law when a litigant fails to timely respond to the requests. Nor do the Rules contemplate a non-responding party filing proposed responses. They do not take away all discretion from a trial court in deeming requests admitted. Purdue has labeled its failure to respond to requests for admission as "gotcha" litigation by the Commonwealth, but the Commonwealth was simply following CR 36.01(2). Purdue did not request an extension of time to answer the requests, and if it is vulnerable to judgment, it is because of its own failure to respond.

This case is also distinguishable from *Omaha Indemnity Corp.* The Pike Circuit Court did not rule in violation of an evidentiary rule and precedent. Further, Kentucky courts have firmly-entrenched the requirements for a writ, rather than general criteria that are applied depending on the facts and circumstances of a case. However, the Court's cautionary tale of granting writ relief at the drop of a hat and the gridlock it would cause on appellate and trial courts is universally applicable.

Purdue also cites the inapposite case of *Ex parte Buffalo Rock Co.*, 941 So.2d 273 (Ala. 2006). There, the Court issued a writ after the trial court did not allow the petitioner to assert the affirmative defenses of *res judicata*. *Id.* at 278. Pike Circuit Court did not bar Purdue from raising any affirmative defenses. Again, it granted Purdue's

motion to amend its answer to add the affirmative defense of *res judicata*.

Since the cases Purdue cites are distinguishable from this matter, they do not support Purdue's request that this Court change Kentucky's long-standing law on writs.

CONCLUSION

Purdue cannot show it is entitled to an extraordinary writ in this action because it has an adequate remedy by appeal. This Court has consistently reaffirmed the law on the extraordinary remedy of writs and should not change that well-reasoned precedent for Purdue. This is not a "certain special case" and changing the settled law on writs would open the floodgates to any litigant aggrieved every day decisions by trial courts. This case should proceed in Pike Circuit Court, unhampered by a writ that would bring a "specter of injustice" to the proceedings.

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Respectfully submitted,

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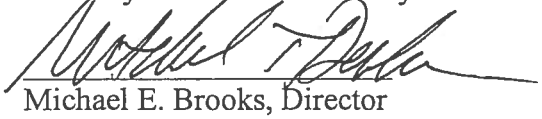

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